In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 256

FRANK BRUCE RISING, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 121-122) is reported at 197 F. 2d 335.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1952 (R. 122), and a petition for rehearing was denied on July 14, 1952 (R. 126). The petition for a writ of certiorari was filed on August 5, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial judge properly admitted testimony of the witness with whom petitioner had undergone a marriage ceremony known to be bigamous.

2. Whether the trial judge properly instructed the jury as to the nature of the offense of transporting a woman in interstate commerce for the purpose of prostitution.

3. Whether the trial judge properly admitted certain additional items of evidence.

4. Whether petitioner was given a fair trial.

STATUTE INVOLVED

18 U.S.C. 2421:

> Whoever knowingly transports in interstate * * * commerce * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * *
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> * * * * * * * *
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> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Fifth Circuit (R. 122, 126) affirming per curiam (R. 121-122) the judgment of the District Court for the Northern District of Texas imposing a sentence of five years' imprisonment and a fine of $1,000 upon petitioner (R. 7-8), upon the verdict of the jury finding petitioner guilty as charged (R. 6), under an indictment alleging that petitioner transported one Gwen Lynn Scott from Los Angeles, California, to Dallas, Texas, for the purpose of prostitution (R. 1-2).

The Government's principal witness was Gwen Scott. She testified that she was born April 16, 1930 (R. 13, 39), that she was first married to her husband on December 4, 1948, that they were divorced on April 5, 1950, and re-married January 21, 1951, and never divorced thereafter (R. 13, 41, 73-74, 81).

In June 1951, while her husband was in California, Scott had an affair with petitioner in Illinois. One night pictures were taken of Scott in the nude in the act of smoking marihuana. (R. 14-15.)[1]

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[1] Petitioner's objection to testimony that he furnished the marihuana was overruled, the judge instructing the jury that petitioner was not being tried for dispensing marihuana but that the evidence was admitted only as reflecting on the witness's condition at the time (R. 16).

Scott testified that, at that time, petitioner asked her to be a prostitute for him (R. 16).

In July 1951, Scott rejoined her husband in Los Angeles, California,[2] and approximately two weeks later, petitioner and one Buck McIntosh came to the Scotts' apartment in Los Angeles and Scott went out with the two in fear that they would show the pictures taken in Rock Island to her husband and others. Petitioner stated to Scott, "You will never get me in any trouble as long as I have got these pictures." Scott "had an affair" with petitioner and "he made [her] have an affair with Mr. McIntosh." (R. 17-19, 21, 22.)

On the next night, petitioner and McIntosh took Scott to the hotel, and again attempted to induce her to become a prostitute. The next day, petitioner beat Scott with his belt for keeping his car out so long, McIntosh meanwhile standing by and watching. Petitioner then told Scott she was "going to be a prostitute, you might as well make your mind up," and other language to the same effect. (R. 22-24.) At a night club the argument continued, Scott still in fear of the two. Scott induced petitioner and McIntosh to take her to her apartment and when she refused to leave there, petitioner pulled her out of the apartment, took her back to the hotel, and after they started

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[2] Petitioner's counsel objected to "all of this stuff prior to the alleged offense" and was overruled (R. 18).

drinking, forced her to have intercourse with the bellboy in the hotel. (R. 24-25, 60.)[3]

At 6:00 o'clock in the morning, petitioner and McIntosh told Scott they were leaving and that she was going with them. Petitioner beat Scott again, across the face. The three of them drove off to Oklahoma City, Scott having no extra clothes with her. There was further slapping and threatening of Scott by petitioner at a motel where they stayed en route, petitioner stating to Scott, "Your folks won't have anything to do with you when I get through with you." (R. 25-27.) They drove to the home of petitioner's brother and sister at Lubbock, Texas, petitioner warning Scott that they were to represent themselves as being married. Petitioner then forced Scott to phone her husband at Los Angeles, meanwhile holding her by the hair. When she sought to inject some word of her plight into the conversation, petitioner dragged her out of the house, threatened to kill her, and beat her until she ran back into the house to the brother and sister, bleeding from a two-inch cut in her forehead acquired in a fall. (R. 27-29).

Petitioner borrowed some money from his brother (R. 61). He and McIntosh then drove Scott

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[3] The testimony "he made me have intercourse with the bellboy" was objected to on behalf of petitioner as having no relation to the transportation and as being inflammatory. The objection was overruled on the ground that the testimony showed "a system leading up to the final charge" (R. 25).

to Big Spring, Texas, with further threats and brutality en route. At the hotel, the two men forced her to have intercourse with the bellboy. (R. 30-31.) They also asked the bellboy to get some business for her. She was sent to three rooms. In the first two rooms she was too frightened to obtain any money, but upon further raging by petitioner, she obtained five dollars in the third room, which she turned over to petitioner. (R. 31-33.)

Scott worked in the hotel for three days, petitioner coming in every two hours or so, taking the money, and threatening her. Then he took her to Odessa, Texas, informing her that he was going to marry her, "I will make it legal, so you can never get away. * * * You will be committing bigamy." McIntosh remarked, at the same time, "Well, how many times has this been for you, Rising?" (R. 33-34, 62, 80.) The three then drove to Lovington, New Mexico, where Scott signed marriage instruments with her maiden name pursuant to petitioner's orders and an ostensible marriage ceremony was enacted. (R. 34-35, 63-68.)

On the next day, petitioner drove Scott to a hotel in Odessa and instructed her to go in and talk to the bellboy about going to work as a prostitute (R. 35). Petitioner then drove Scott to Dallas where they registered at a motel. Petitioner offered the bellboy intercourse with Scott

and asked him to obtain business for her. During the stay in Dallas, petitioner traded his Cadillac for a Pontiac, thereby obtaining some money. A few nights later, petitioner induced the apparently frightened bellboy to have intercourse with Scott in payment for whiskey. (R. 35-37, 60-61.) From Dallas, the two returned to Odessa and then went to Lubbock, Texas, where some marihuana was picked up. Scott left petitioner at Richmond, Virginia, on August 28. (R. 37-38.)

In substantiation of Scott's testimony, one bellboy, Davis, of the Dallas motel, testified that petitioner had asked him, in Scott's presence, to refer to him any men desiring girls (R. 83-84), and a second bellboy at the motel, Livingston, testified that he had been similarly solicited by petitioner and that he had been urged three times by petitioner to accept payment for whisky by sexual intercourse with Scott (R. 88-91).

ARGUMENT

1. Petitioner contends that the trial judge should have extended him the privilege of a husband against testimony of a wife and excluded all testimony of the witness Scott relating to matters prior to the ostensible marriage ceremony in August 1951, and that upon such exclusion the evidence of petitioner's guilt would have been insufficient (Pet. 3-5, 13-16). But the evidence is uncontradicted that the witness Gwen Scott re-

married Jack Scott on January 21, 1951, that they were never thereafter divorced (*supra*, pp. 3-6), and that when petitioner later forced the witness to go through the forms of a marriage ceremony in August 1951 he did so in full knowledge that no marriage was being effected, but only a bigamous ceremony.[4] It is undisputed law that the privilege against testimony by one's wife does not apply to testimony by a woman with whom a second, bigamous relationship has been entered into. *Miles* v. *United States*, 103 U.S. 304, 313; 8 Wigmore, *Evidence* (3d ed., 1940) § 2231.

Moreover, under the uniform holding of the United States Courts of Appeals and other authorities, even if the witness here had actually been petitioner's wife the offense of transporting her for purposes of prostitution would have constituted such injury to her as would require her testimony to be admitted within the long-established exception to the privilege in cases of injury to the wife. See recent reviews of authorities in *United States* v. *Mitchell*, 137 F. 2d 1006, 1008-1009 (C.A. 2), reaffirmed, 138 F. 2d 831, certiorari denied, 321 U.S. 794; *Shores* v. *United States*, 174 F. 2d 838, 839-841 (C.A. 8),

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[4] Obviously, the subsisting, earlier marriage could not be considered to be in dispute merely upon the innuendo of petitioner's counsel, and without adducing of evidence other than hearsay evidence of petitioner's and Scott's statements in a sham marriage ceremony that Scott was single (R. 64-65).

overruling the one earlier federal case possibly *contra, Johnson* v. *United States,* 221 Fed. 250 (C.A. 8); *United States* v. *Graham,* 87 F. Supp. 237, 238-241 (E.D. Mich.); 8 Wigmore, *Evidence* (3d ed., 1940) § 2239, n. 13.

2. Petitioner complains that the judge's charge failed to define the offense for the jury (Pet. 3-5, 13, 16-18). However, the judge read the indictment (R. 98-99) and summarized the facts which the jury must find to establish guilt (R. 100). In addition he said (R. 100):

> In that connection I give you a requested charge by the defendant. We have substantially covered it, but we want to give it in his language.
>
> Gentlemen of the jury, I charge you, as part of the law in this case, that even though you have found, beyond a reasonable doubt, that the defendant induced and caused the said Gwen Lynn Scott to engage in prostitution in Dallas, Texas, and other places in Texas, yet, unless you further find and believe beyond a reasonable doubt, that the defendant transported the said Gwen Lynn Scott from Los Angeles, California to Dallas for the sole purpose of prostitution of Gwen Lynn Scott, you will acquit the defendant, or, if you have a reasonable doubt thereof, you will find the defendant not guilty.

This language and the remainder of the charge clearly enlightened the jury and went well beyond the minimum required to safeguard petitioner's rights.

3. Petitioner's various objections to rulings on the admissibility of evidence (Pet. 18-22) are without merit.

a. He complains (Pet. 18-19, 22) that Gwen Scott's remarriage to Scott was improperly proved by the admission of a minister's certificate of the marriage and a certificate of the Clerk of the District Court of the State of Iowa that the return of the marriage certificate was of record (R. 76-80), in that the records were not properly authenticated under 28 U.S.C. 1739. However, the certification by the clerk of the return of the record entry, which included a certification of the marriage certificate (R. 79), was in accord with Rule 44(a), F.R. Civ. P., which provides:

> An official record or an entry therein, when admissible for any purpose, may be evidenced * * * by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States * * * the certificate may be made * * * by any public officer having a seal of office and having official

> duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. * * *

28 U.S.C. 1739, cited by petitioner (Pet. 22), does not establish an exclusive method of proving records. As stated in the Notes of the Advisory Committee on Rules:

> [Rule 27, F.R. Crim. P.] incorporates by reference Rule 44 of the Federal Rules of Civil Procedure * * *. The rule does not supersede statutes regulating modes of proof in respect to specific official records. In such cases *parties have the option of following the general rule or the pertinent statute.* [Italics supplied.]

b. Petitioner contends that it was improper to admit the evidence that petitioner gave Scott marihuana at the outset in Illinois and took pictures of her in the nude (Pet. 19) and that petitioner forced Scott to have intercourse with a bellboy before the transportation (Pet. 19-21). But, as pointed out by the trial judge, these acts disclosed petitioner's system of operation (*supra,* pp. 3-5). While the judge safeguarded petitioner's rights by specifically warning the jury that petitioner was not being tried for dispensing marihuana (*supra,* p. 3, fn. 1), he was clearly correct in noting that the fact as to the marihuana would disclose Scott's condition at the time when

petitioner secured his hold on her by obtaining the pictures in the nude, only a month or two, at most, prior to the transportation for purposes of prostitution (*supra*, pp. 3-4).

4. Equally without merit are petitioner's claims that he was denied a fair trial by reason of the remarks of the trial judge (Pet. 22-25).

At the opening of the trial, the United States Attorney stated that there would be obscene testimony in the case and suggested that the court might wish to warn the spectators (R. 12). Counsel for petitioner objected, saying:

> I wish to take an exception to counsel's remark. It is glamorizing his lawsuit, and we except to counsel's remark and ask the Court to tell the jury not to consider it for any purpose.

The Court then said:

> All right. Gentlemen of the jury, you will not consider that comment in any way against the defendant. Cases of this character usually sound like something without the fragrance of roses.
>
> All women in the Courtroom may be excused unless they especially want to hear something of this character.

Petitioner took no exception to the foregoing statement of the judge to the jury. His present

claim that it constituted prejudicial error is obviously specious, particularly in the light of the actual testimony in the case.

In ruling on evidence, the judge pointed out to counsel that the offense of transporting for purposes of prostitution would be made out irrespective of the prostitute's former character, since the offense was against society and not the person (R. 43, 45, 57). This correct statement of the law was certainly not, as petitioner claims (Pet. 24) a prejudicial indication of opinion. Certainly there is no basis for the claim that petitioner was prejudiced when the judge sustained his objection to a question, as to petitioner's prior reputation in Dallas (R. 85, Pet. 24). As for the judge's comment that "Sufficient unto the day is the evil thereof" (R. 92, Pet. 25), it was made in connection with an attempt by petitioner's counsel to inject an issue of rape into his cross-examination of a bellboy. (R. 91-92.)

A sufficient answer to all of petitioner's claims is the charge of the court as follows (R. 99-100):

> If you, at any time, have formed any thought, or any opinion, as to what the Court thinks about this case, from any ruling, or from any portion of this charge, or anything that transpired in the trial, that the Court has an opinion as to what should be done in the case, don't be influenced by that thought, lay it aside. Your responsibility in the case,

the jury's duty is to find out the truth, the Court's duty is to tell the jury the law, and to see that the case is tried according to law.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

CHARLES B. MURRAY,
Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

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